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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1114

ROY E. KRAMER AND MATTHEW BREEN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is ~~not yet~~ reported at 355 F. 2d 891.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 1966. A petition for rehearing was denied on February 10, 1966. The petition for a writ of certiorari was filed on March 11, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence of obstruction of interstate commerce was sufficient for a conviction under the Hobbs Act.

2. Whether petitioner Breen's post-indictment statements to a group of union officials and contractors were properly admitted into evidence.

3. Whether the same conduct may violate both the Hobbs Act and the Taft-Hartley Act.

STATEMENT

Petitioners were convicted by a jury in the United States District Court for the Northern District of Illinois of obstructing, delaying and affecting commerce by extortion (count 1), in violation of 18 U.S.C. 1951. Petitioner Kramer, an employee representative, was additionally convicted of receiving money from an employer (count 2), in violation of 29 U.S.C. 186(b). He was sentenced to imprisonment for four years and fined $5,000, on count 1, and the court ordered "that imposition of sentence on count 2 of the indictment be and hereby is suspended" (R. 193–194).[1] Petitioner Breen was sentenced to imprisonment for three years and fined $10,000 (R. 194–195). The court of appeals affirmed (Pet. App. A).

1. The evidence showed that, in the Spring of 1961, Oscar Bohlin & Son was the general contractor for the construction of a telephone company building to house switching machinery for intrastate and interstate telephone traffic (R. 19, 24). Bohlin's general superintendent, Herndon, asked Kramer, the business agent for the ironworkers union, to refer to Bohlin any local contractors who wished to bid on the contract for placing reinforced steel (R. 23–24, 30).

[1] "R." references are to the Joint Appendix for the Appellants in the court of appeals.

Kramer agreed to "send them over" (R. 24). Shortly thereafter, Breen submitted a bid on behalf of Cass Steel (R. 25, 30). Two other contractors entered lower bids, but one withdrew (R. 25) on being told by Kramer that "You don't want this job" (R. 34). On June 1, 1961, the contract for the ironwork was awarded to the remaining low bidder, D & N Ironworks, owned by George E. Noldan (R. 25, 88).[2]

Herndon and D & N's superintendent, Laterno, asked Kramer for workers to unload iron (R. 25). When Kramer discovered that D & N, instead of a local contractor, had secured the job, he shook his finger in Herndon's face and refused to provide any men without 48 hours' notice (R. 25–26). No ironworkers were furnished (R. 89) and the general contractor was forced to unload the steel himself (R. 26).

After learning of this, Noldan, the president of D & N, had a friend speak with Breen in order to see if the manpower difficulties could be eliminated (R. 56). Breen said that the telephone company building was supposed to have been his job, and he could do nothing (R. 56). On being contacted a second time, Breen said that, if Noldan needed help, "it is going to cost him" (R. 58). He fixed the price at $3,000 and refused to accept periodic payments because the money, he said, had to be divided among

[2] D & N Ironworks was engaged in fabricating and erecting ironwork in Illinois, Indiana and Wisconsin (R. 87–88). In 1961, D & N made steel purchases of approximately $100,000. Most of the steel was manufactured outside the State of Illinois (R. 21–22, 87), and D & N used out-of-State steel in constructing the telephone company building (R. 78–81, 87).

many people (R. 59–61). Breen remarked that, if Noldan did not have $3,000, he should not be in business (R. 62). In return for the payment, Breen said, Noldan would receive good union help and lower paid apprentices, would be able to use non-union men and work shorthanded (R. 61–62).[3] Noldan declined this offer. Throughout June and July, Noldan was furnished substandard ironworkers and construction progressed slowly (R. 26, 89).

On August 1, 1961, Kramer notified Noldan that he wanted to see him (R. 89). At the meeting, Kramer acknowledged that he was making matters difficult for Noldan, and asked what it would be worth to resolve the labor problem (R. 89). Noldan informed him that he could not afford $3000 (R. 89). Kramer responded, "this is the reason that we have adjusted the figure downwards" (R. 90); "his people had offered to make or adjust it downward to a figure of about $1,000" (R. 90).[4] Noldan maintained that he could not make such a payment all at once, but could manage it as a payroll expense of $100 a week. Kramer stated that he would have to talk to his people (R. 90). He called Noldan the next day and told him that the deal was all right; Noldan could lay off the slow ironworkers (R. 90).[5]

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[3] Kramer, as the union business agent, decided which men would work on a given job (R. 33). Breen was a member of an association of employers (R. 87); he was not an officer or member of the union.

[4] Noldan offered four or five hundred dollars. Kramer refused because "we have to split this thing three or four different ways" (R. 90).

[5] Noldan felt that he had no choice but to agree to enter this deal because his business would otherwise be destroyed (R. 90).

Noldan was sent better ironworkers. The construction proceeded "beautifully" without further labor trouble (R. 26, 91). Noldan made three payments of $100 each, on August 23, September 1, and September 22, 1961 (R. 91–93). On September 22, 1961, the F.B.I. confronted Kramer (R. 130–132), and, thereafter, the work "progressed very poorly" (R. 93). The telephone company building was not completed until six weeks after the scheduled date as a result of labor trouble (R. 26–28).

2. In June 1964 (approximately one year after Breen and Kramer had been indicted), Breen attended a meeting of labor and management concerning contract negotiations. Among those present was James Benson, the then acting business agent of the ironworkers union. He had succeeded Kramer in that post (R. 32, 34–35, 41). Benson testified to statements made by Breen at this meeting (R. 41):

> We had this negotiating meeting between the contractors, executive board, president, myself, and the secretary, and Donald Russell was discussing a point about the referral system. Mr. Breen looked at him and he said, you can talk now. He said, a few years ago you were a Charley McCarthy.
>
> He looked at me and the rest and he said, you all were a bunch of Charley McCarthys a few years ago.
>
> I told Breen, knock it off. Maybe we were Charley McCarthys, but I will tell you what you were, you were the Mortimer Snerd.
>
> Like hell I was, he said, I was the boss. I called the shots. I gave the orders. I told Kramer what to do.

He said, I was the boss. Benson, he said, I could tell you a lot of things.

I said, Breen, you probably could. He said, I was the boss. He said, let us go on with the meeting.

ARGUMENT

1. There is no merit to petitioners' argument (Pet. 23, 25–28) that hindrance of the contractor's use of inventoried construction materials, which had come from out-of-State sources, is not capable of being an interference with interstate commerce within the meaning of the Hobbs Act (18 U.S.C. 1951). "That Act speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence," and it "outlaws such interference 'in any way or degree.'" *Stirone* v. *United States*, 361 U.S. 212, 215.[6] Extortionate activities which are likely to slacken or stop the interstate movement of goods plainly fall within the statute.[7] *Ibid.* The victim of petitioners'

[6] The exaction of money from a company engaged in interstate commerce is itself interference which comes within the proscription of the Act. *United States* v. *Provenzano*, 334 F. 2d 678, 692–693 (C.A. 3), certiorari denied, 379 U.S. 947; *Anderson* v. *United States*, 262 F. 2d 764, 770 (C.A. 8), certiorari denied, 360 U.S. 929; *Hulahan* v. *United States*, 214 F. 2d 441, 445 (C.A. 8), certiorari denied, 348 U.S. 856. Here, the contractor was engaged in business over a three-State area.

[7] In *Wickard* v. *Filburn*, 317 U.S. 111, this Court held that a farmer's production of wheat, intended for his own consumption and use on his farm, could nonetheless have such a substantial effect on interstate commerce in wheat as to make it

threats and actions was a contractor purchasing most of its steel from interstate sources, and it was using such steel in the construction of the telephone company building. If the company's work were hindered, or if the company were forced out of business, the interstate flow of steel would diminish. Indeed, the contractor suffered serious delay as a result of petitioners' conduct (before Noldan acceded to petitioners' terms and after Noldan discontinued the payments). This, of course, slowed the use of interstate steel on hand and the replenishment of that inventory.[8]

Petitioners urge resolution of the question reserved in *Stirone*, namely, whether the construction of a facility for future use in interstate operations would alone satisfy the commerce element of the Hobbs Act. However, this case does not present that issue. The trial judge instructed the jury that a finding of interference with interstate commerce was permissible if

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subject to congressional control. The cases relied on by petitioners (Pet. 27–28) do not suggest that Congress is without constitutional power to legislate with respect to interstate goods which have become a part of the "general property in a state." Those cases indicate the point at which a State may exercise its regulatory powers over such interstate goods in the absence of inconsistent federal legislation.

[8] For similar reasons there is no basis to the contention of petitioner Kramer that the ironworkers hired from his union to do the reinforced steel work on the telephone exchange building were not employed in "an industry affecting commerce" as that phrase is used in the Taft-Hartley Act (Pet. 30). *United States* v. *Gibas*, 300 F. 2d 836, 839 (C.A. 7), certiorari denied, 371 U.S. 817; *United States* v. *Pecora*, 267 F. 2d 512, 515–516 (C.A. 3). See footnote 6, *supra*.

the jury found favorably to the government *both* as to the source of the construction material and the prospective use of the building.[9] Since the interstate character of the construction material was itself a sufficient nexus with commerce, and the jury was required to accept the government's evidence as to it in order to reach its verdict, it is unnecessary to consider the further question raised by petitioners.[10] We do not mean to suggest, however, that we doubt that petitioners' threats to hinder construction of the telephone company building constituted an effect on interstate commerce in the particular circumstances of

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[9] The instructions were as follows (R. 171):

"If you believe the testimony of the government witnesses with reference to where the various materials came from which were supplied to the Illinois Bell job and with reference to the use to which the building upon which the work was to be performed would be put, and if you find that the defendants' activities as shown by the government's testimony did delay, obstruct and affect interstate commerce in any way or degree—because that language is used in the statute—then you may find that the government has established the requisite element of effect on interstate commerce under the Hobbs Act."

[10] Petitioners assert that the trial court erred in its charge because it left to the jury to determine whether an effect on interstate commerce existed (Pet. 20–22). But petitioners benefited from the charge as given and thus cannot complain. It is settled that the trial court could properly have instructed that, if the jury believed the government's witnesses, the interstate commerce element would be established as a matter of law. *Nick* v. *United States*, 122 F. 2d 660 (C.A. 8), certiorari denied, 314 U.S. 687; *Hulahan* v. *United States*, *supra*; *United States* v. *Lowe*, 234 F. 2d 919, 922 (C.A. 3), certiorari denied, 352 U.S. 838; *United States* v. *Green*, 246 F. 2d 155, 161 (C.A. 7), certiorari denied, 355 U.S. 871. Certainly petitioners were not prejudiced because the trial court permitted the jury to apply the law to their advantage.

this case. Through the erection of the building, the Bell Telephone Company (which unquestionably is engaged in interstate commerce) sought to expand its interstate facilities and operations. Petitioners' extortion could, and did, interfere with that effort, and did, in that way and in that degree, delay and affect interstate commerce. Cf. *Wickard* v. *Filburn,* 317 U.S. 111. This Court need not weigh the exact impact of petitioners' conduct on interstate commerce so long as some impact, as in this case, is established. Cf. *Polish Alliance* v. *National Labor Relations Board,* 322 U.S. 643, 648. We believe that extortion, enforced by labor "slowdowns," in connection with construction of facilities of interstate commerce, is properly within the cognizance of Congress as a matter which affects interstate commerce.

2. Petitioner Breen maintains (Pet. 16–20) that the admission in evidence of his post-indictment statements was error because they were not relevant, nor, in his view, was their reliability established in accordance with *Opper* v. *United States,* 348 U.S. 84. Breen's remarks were, in substance, that "a few years ago" he "gave the orders" and "told Kramer what to do" (R. 41). They clearly indicate that Breen was in control of Kramer's activities during the latter's tenure as business agent of the union, and thus tend to confirm Breen's connection with the extortion. Therefore, the statements were relevant and the weight to be given to them was a matter for the

jury. *Jones* v. *United States,* 296 F. 2d 398, 402–403 (C.A.D.C.), certiorari denied, 370 U.S. 913; *Thomas* v. *United States,* 281 F. 2d 132, 136 (C.A. 8), certiorari denied, 364 U.S. 904. Nor does the *Opper* case bar the admission of the statements, for their trustworthiness was amply corroborated (Pet. App. 9a). The reliability of the statements may be inferred from the fact that they were voluntarily made to third parties. Furthermore, they coincide with the other evidence of Breen's involvement in the extortion. Significantly, it was Breen who made the initial demand of $3,000.

3. Petitioner Kramer contends (Pet. 31–33) that he could not be convicted of violating both the Hobbs Act and Section 302(b) of the Taft-Hartley Act (29 U.S.C. 186(b)). The statutes, he says, define mutually inconsistent offenses. Prior to the 1959 amendment to the Taft-Hartley Act, some lower court decisions had interpreted Section 302(b) as limited to an employee representative's passive receipt of a bribe; since the Hobbs Act is concerned with those who obtain money through coercion, it was concluded (see the cases cited by petitioner (Pet. 32–33)) that a person could not violate the Hobbs Act and Section 302(b) by the same conduct. In 1959, Section 302(b) was amended (Pub. L. 86–257, Title V, § 505, 73 Stat. 537) so that it now applies to an employee representative who requests or demands money from an employer. *Arroyo* v. *United States,* 359 U.S. 419, 426, n.

8. Consequently, the two statutes can no longer be said to define inconsistent crimes.

Petitioner Kramer's further contention (Pet. 34) that it is improper to impose cumulative sentences under the two counts is premature. The trial court suspended imposition of sentence on the second count without designating either the terms or the period of probation (R. 194). The order of the court as to count 2 is therefore a nullity. *E.g., Ex parte United States,* 242 U.S. 27; *United States* v. *Sams,* 340 F. 2d 1014, 1019-1020 (C.A. 3), certiorari denied, 380 U.S. 974; *United States* v. *Graham,* 325 F. 2d 922, 925 (C.A. 6); 18 U.S.C. 3651. At this juncture, it cannot be said whether the trial court will impose a sentence consecutive to or concurrent with the prison sentence imposed on count 1.[11] We suggest that a proper disposition would be to grant the petition for a writ of certiorari with respect to Kramer and to remand the cause to the district court for entry of a correct sentence.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted as to petitioner Kramer, the order suspending the imposition of sentence for

[11] In all likelihood, the trial court probably intended that petitioner Kramer be punished only for the Hobbs Act violation (count 1). If that is so, the matter can be dealt with finally on remand by imposition of a concurrent sentence (the maximum under Section 302(b) being one year and a fine).

the conviction on count two of the indictment should be vacated, and the cause remanded to the district court for entry of an appropriate sentence. In all other respects, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
PAUL C. SUMMITT,
Attorneys.

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